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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

EPIC GAMES, INC.,

Plaintiff, Counter-defendant,

vs.

APPLE INC.,

Defendant, Counterclaimant.

Case No. 4:20-CV-05640-YGR-TSH

**ADMINISTRATIVE MOTION OF NON-PARTY GOOGLE, LLC TO SEAL PORTIONS OF TRIAL EXHIBITS**

The Honorable Yvonne Gonzalez Rogers

Trial: May 3, 2021

## **INTRODUCTION**

2 Apple Inc. has given notice to non-party Google LLC (“Google”) that it intends to  
3 introduce as evidence in this trial certain documents produced by Google in response to a third-  
4 party subpoena. Google moves the Court to issue an administrative order authorizing the sealing  
5 of certain portions of these exhibits containing confidential Google information. Counsel for both  
6 Apple and Epic Games have reported that they take no position on this motion. Google provides  
7 in the accompanying declaration of Andrew Rope copies of these documents with the portions  
8 proposed to be redacted highlighted. Because the highlighted versions of the documents reveal  
9 the confidential information that Google seeks to redact and seal, Google submits these  
10 documents under seal for the Court’s review under Local Rule 79-5(c). Upon an order granting  
11 this motion to seal, Google will prepare and provide to the parties redacted versions of the  
12 documents which may be used in any public portion of the trial.

Pursuant to the procedures under the Local Rules and which the Court has established in  
this case for the protection of confidential material, Google does not object to the unredacted  
versions of these documents being used during the trial proceedings, assuming they are otherwise  
admissible, so long as the public monitors or other displays are turned off while they are being  
displayed, the redacted information sought to be sealed is not revealed during the course of  
questioning, and only redacted versions of the exhibits are admitted into the public record.

19 This motion is supported by the Declaration of Andrew Rope on behalf of Google.

## **LEGAL STANDARD**

21 Local Rule 79-5 provides that documents, or portions thereof, may be sealed if a party  
22 "establishes that the documents, or portions thereof, are privileged, protectable as a trade secret,  
23 or otherwise entitled to protection under the law." Civ. L. R. 79-5(b).

24        While courts generally apply a “strong presumption in favor of access” to court records,  
25 compelling reasons (or good cause, as applicable) “sufficient to outweigh the public’s interest in  
26 disclosure and justify sealing court records exist when such ‘court files might have become a  
27 vehicle for improper purposes,’ such as the use of records to ... release trade secrets.” *Kamakana*  
28 *v. City and Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon v. Warner*

1       *Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)). Sealing may be justified to prevent judicial  
2 documents from being used as business information that might harm a litigant’s competitive  
3 standing. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2013 WL  
4 163779, at \*1 (N.D. Cal. Jan. 15, 2013).

ARGUMENT

The information Google seeks to seal is the type that the Supreme Court, Ninth Circuit, and this District have held to properly be kept under seal. *See Nixon*, 435 U.S. at 598 (“[C]ourts have refused to permit their files to serve as ... sources of business information that might harm a litigant’s competitive standing”); *In re Elec. Arts, Inc.*, 298 F. App’x 568, 569-70 (9th Cir. 2008) sealing confidential business information including “pricing terms, royalty rates, and guaranteed minimum payment terms”); *Sun Microsystems Inc. v. Network Appliance*, No. C-08-01641-EDL, 2009 WL 5125817, at \*9 (N.D. Cal Dec. 21, 2009) (sealing “confidential business information which could cause harm to the parties if publicly disclosed”).

14        The Federal Circuit has similarly concluded that, under Ninth Circuit law, sensitive  
15 competitive information such as pricing, profit, and customer usage information, when kept  
16 confidential by a company, is appropriately sealable where that information could be used to the  
17 company's competitive disadvantage. *Apple Inc. v. Samsung Elecs. Co. Ltd.*, 727 F.3d 1214,  
18 1225 (Fed. Cir. 2013).

19        The information Google seeks to seal retains independent economic value from not being  
20 generally known to, and not being readily ascertainable through proper means to the general  
21 public. 18 U.S.C. § 1839(3)(B). Rope Decl., ¶ 5. If disclosed, this information would cause  
22 Google competitive and commercial harm because it would provide competitors and actual or  
23 potential business counterparties insights into Google’s business that they would not otherwise  
24 have, and could disadvantage Google in marketing to consumers and in future negotiations with  
25 potential customers. Rope Decl., ¶¶ 5-26. *See Nixon*, 435 U.S. at 598. Separately, in various  
26 places in these proposed exhibits, the internet address of certain internal Google documents is  
27 revealed. If publicly disclosed, Google could be subject to attempts at unauthorized and improper  
28 access of these documents and concerted efforts to direct attacks at these locations on Google’s

1 servers. Furthermore, as these addresses have no relevance to anything in the documents or in  
 2 this trial, Google also moves to seal those portions of the documents.

3 This motion to seal is further warranted because Google is not a party to this action but  
 4 produced the information it seeks to seal in response to a subpoena. Courts are generally more  
 5 protective of the confidential business information of non-parties who have not voluntarily  
 6 invoked the court's jurisdiction. *See, e.g., Hunt v. Cont'l Cas. Co.*, No. 13-cv-05966 HSG, 2015  
 7 WL 5355398, at \*2 (N.D. Cal. Sept. 14, 2015) (sealing third parties' names where such  
 8 information "implicates important privacy concerns of nonparties—whose names are not relevant  
 9 to the disposition of this case—that outweigh the public's interest in disclosure of these judicial  
 10 records"); *Icon-IP Pty Ltd. v. Specialized Bicycle Components, Inc.*, Case No. 12-cv-03844-JST,  
 11 2015 WL 984121 at \*2 (N.D. Cal., Mar. 3, 2015) (granting motion to seal "highly sensitive  
 12 business information" of non-party witness). Moreover, it is doubtful that the information of non-  
 13 party Google could be "dispositive" in an action to which it is not a party, and therefore Google  
 14 need only demonstrate "good cause" for an order to seal rather than the "compelling reasons"  
 15 standard, although this request meets either standard. *See Icon-IP Pty*, 2015 WL 984121 at \*4  
 16 (applying "good cause" standard to seal rather than "compelling reasons" standard generally  
 17 applicable on a motion for summary judgment where the particular material sought to be sealed  
 18 "would not be effectively dispositive of any of the issues raised in the parties' motions for  
 19 summary judgment").

20 As detailed in the attached Rope declaration, portions of the following potential trial  
 21 exhibits are sealable because they contain exceptionally sensitive commercial information that  
 22 might harm Google's competitive standing. Google accordingly moves to seal these limited  
 23 portions of the identified trial exhibits.

24 Exhibit Nos. DX-4172, DX-3558, DX-4303, DX-4522, DX-3913, DX-4046, DX-3452,  
 25 DX-4910 and DX-5325 (duplicates of DX-4172), DX-5326 (duplicate of DX-3452): Google  
 26 moves to seal limited portions of these exhibits that contain information regarding Google's  
 27 internal analyses of consumer spending and revenue, future strategic business plans, and potential  
 28 growth opportunities. If revealed to competitors and potential business counter-parties, they

1 could use this non-public and confidential information to disadvantage Google in marketing,  
 2 negotiations, and competitive strategic decision-making. Rope Decl., ¶¶ 7-13.

3 Exhibit Nos. DX-3779, DX-3798, DX-4909 (duplicate of DX-3798): Google moves to  
 4 seal limited portions of these exhibits that contain Board presentations and information regarding  
 5 Google's internal risk analyses, internal analyses of security and threat detection processes, and  
 6 internal analyses of revenue and business opportunities. If revealed to competitors and potential  
 7 business counter-parties, they could use this non-public and confidential information to  
 8 disadvantage Google in marketing, negotiations, and competitive strategic decision-  
 9 making. Public disclosure could further enable malefactors to create or exploit security risks on  
 10 consumer devices. Rope Decl., ¶¶ 14-15.

11 Exhibit Nos. DX-3365, DX-3584: Google moves to seal portions of these exhibits that  
 12 contain confidential data on business revenues, including detailed non-public breakdowns of  
 13 revenue based on internal classifications. If revealed to competitors and potential business  
 14 counter-parties, they could use this non-public and confidential information to disadvantage  
 15 Google in marketing and in negotiations. Rope Decl., ¶¶ 16-17.

16 Exhibit Nos. DX-3165, DX-3250, DX-3598, DX-3942, DX-4001, DX-4310: Google  
 17 moves to seal these exhibits in full as they contain confidential surveys and analyses of consumer  
 18 information and preferences. If revealed to competitors, they could selectively cite to the findings  
 19 to disadvantage Google in marketing, and they could take advantage of the costly and detailed  
 20 internal Google analyses to tailor their own product design and marketing in ways that further  
 21 disadvantage Google. Rope Decl., ¶¶ 18-23.

22 Exhibit No. DX-4478: Google moves to seal limited portions of this exhibit that contain  
 23 confidential information regarding Google's internal business operations and strategy plans. If  
 24 revealed to competitors and potential business counter-parties, they could use this non-public and  
 25 confidential information to disadvantage Google in marketing and in negotiations. Rope Decl., ¶  
 26 24.

27 Exhibit No. PX-0506: This document, produced by Apple, contains information regarding  
 28 the revenues, profitability, and subscriber information from Google's YouTube applications on

1 Apple devices. Google moves to seal portions of this exhibit on the ground that competitors and  
2 potential business counter-parties could use this non-public and confidential information to  
3 disadvantage Google in marketing and in negotiations. Rope Decl., ¶ 25.

4 **CONCLUSION**

5 For the foregoing reasons, Google respectfully moves this Court to keep the above-listed  
6 portions of trial evidence under seal.

7  
8 Dated: April 27, 2021

KWUN BHANSALI LAZARUS LLP

9  
10 By /s/ Asim M. Bhansali  
11 Asim M. Bhansali

12 Attorneys for Non-Party  
13 Google, LLC